

1 under certain stylized conditions, the answer
2 is yes. They may have that incentive.

3 Q Is it true that a vertically-
4 integrated MVPD like Comcast may not be making
5 a carriage decision based on what's best for
6 its customer?

7 A It is possible that they are not.
8 That's why as a matter of theory
9 discrimination is possible and it's an
10 empirical question.

11 Q Do you agree that transactions
12 between affiliated firms are harder to police
13 for anti-competitive conduct?

14 A Was that the end of the question?
15 I'm sorry?

16 Q Yes, sir.

17 A Yes, I learned that arm's length
18 negotiations are easier to police because
19 there's the arm's length nature of it.

20 Q And the flip side is also true,
21 correct, that transactions between affiliated
22 firms are harder to police for anti-

1 competitive content?

2 A Yes.

3 Q That's because you don't exactly
4 know what's going on behind the veil, correct?

5 A I think those are the precise
6 words you used in my deposition. I think I
7 answered yes then too.

8 Q You need to be especially careful
9 to make sure that anti-competitive activity
10 isn't going on in places where it can't be
11 publicly monitored, correct?

12 A Yes. That's why we want to look
13 at the behavior of other MVPDs.

14 Q And are you aware of examples
15 where Comcast engages in behind the curtain
16 activities, with its RSNs that might cause
17 anti-competitive concerns?

18 A I've cited the Philadelphia
19 example as one that may raise competitive
20 concerns.

21 Q What about including Comcast cable
22 presidents at Comcast SportsNet budget

1 meetings?

2 A It depends what the purpose
3 is. One of the benefits of vertical
4 integration and one of the ones that MASN
5 benefits too being vertically-integrated is
6 the ability to work together at different
7 points in the vertical chain to develop
8 programming and content. So it depends what
9 the purpose is. If the purpose is to develop
10 a new channel, develop a new programming line,
11 it's perfectly pro competitive.

12 Q So you think it's a benefit that
13 Comcast Cable executives can go to Comcast
14 SportsNet budget meetings?

15 A It depends what the purpose of
16 what they're doing there.

17 JUDGE SIPPEL: But it does present
18 an opportunity for collusiveness that they
19 otherwise wouldn't have, is that right?

20 THE WITNESS: It does raise the
21 prospect of the ability for them to work
22 together on things that are both pro-

1 competitive and potentially anti-competitive.

2 MR. KIM: May I approach the
3 witness, Your Honor?

4 JUDGE SIPPEL: Please do.

5 BY MR. KIM:

6 Q Mr. Orszag, I'm showing you what's
7 been marked as MASN Exhibit 134.

8 Your Honor, this is already in
9 evidence.

10 JUDGE SIPPEL: As is 135, I guess?

11 [REDACTED]

12 BY MR. KIM:

13 Q I'll ask you, sir, have you seen
14 that document before?

15 A In looking through your exhibit
16 list, yes.

17 Q Can I ask you to turn your
18 attention to page 11 of the document? And
19 that is the handwritten numbers below.

20 (Pause.)

21 Are you with me, sir?

22 A I'm reading the document. I'm at

1 that page right now.

2 (Pause.)

3 Q Are you with me, sir?

4 A Yes, I am.

5 Q The second bullet point reads

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Did I read that correctly?

10 A [REDACTED].

11 Q The next bullet point reads,

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]. "

15 Did I read that correctly?

16 A [REDACTED].

17 Q How does it allow Comcast to

18 unique capitalize on our local presence?

19 A Twofold. One of the benefits of

20 vertical integration is increased incentives

21 to market and promote the brand and so that's

22 one way in which it benefits.

1 The second is local knowledge,
2 that they'll have more knowledge about what
3 consumers are truly interested in.

4 Q Could I ask you to turn the page
5 to 12? And let me know when you have had a
6 chance to read this.

7 A I have turned the page.

8 (Pause.)

9 I have now read it.

10 Q Sir, the second bullet point reads

11 [REDACTED] Did

12 I read that correctly?

13 A [REDACTED].

14 Q Point one, [REDACTED]

15 [REDACTED]

16 Did I read that correctly?

17 A [REDACTED].

18 Q And the next sentence, [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] Did I read that

1 correctly?

2 A [REDACTED]

3 Q What does it mean as an economist
4 that we don't believe we can achieve superior
5 economics in this business where we don't have
6 a strong distribution business?

7 A What I think what they're
8 referring to is the fact that where they don't
9 have a distribution business, they can't enjoy
10 the benefits of double -- elimination of
11 double marginalization and increase in
12 promotion or the brand, etcetera, that flow
13 from vertical integration.

14 Q So where Comcast has downstream
15 distribution power, they can really do well
16 with their upstream RSN programming content,
17 correct?

18 A I don't like the word power there,
19 because it has connotations in economics, but
20 where I would say where they have a bigger
21 footprint, where they have more distribution,
22 that allows them to have more potential

1 -benefits from the acquisition of a regional
2 sports network.

3 Q So let me try to rephrase. So
4 where Comcast has downstream distribution
5 channels, they can really make good with their
6 upstream RNS programming content, true?

7 A Yes, but I want to change the word
8 channels because that may confuse the record.
9 Where they have downstream distribution
10 systems, it provides them benefits because it
11 increases their ability to promote and also
12 the elimination of double marginalization.

13 Q Mr. Orszag, you testified as an
14 expert witness in the NFL case, correct?

15 A Yes, I did.

16 Q And in that case Comcast said the
17 price was too high, right?

18 A That is correct.

19 Q And you agreed with that, correct?

20 A Well, the price was too high for
21 them. There are some providers, some MVPDs
22 the price wasn't too high and for others it

1 was too high.

2 Q Do you agree that Comcast, for

3 Comcast the price was too high?

4 A Yes.

5 Q But you didn't say what the right

6 price was, did you?

7 A I did not conduct that analysis in

8 that case, no.

9 Q And in this case, you're an expert
10 witness for Comcast as well, true?

11 A That is correct.

12 Q And Comcast says that the price is
13 too high for MASN in certain disputed regions,
14 correct?

15 A They're saying that the value
16 proposition is not worth it.

17 Q And you agree with that, correct?

18 A Well, when I look at other MVPDs,
19 I find it consistent result, yes.

20 Q You agree with that, correct?

21 A Yes, based on my analysis.

22 Q But you don't say what the right

1 price is, correct?

2 A That is correct.

3 Q Would you agree with me that few
4 people go out there and say that they
5 discriminate?

6 A I'll agree with you that few
7 people go out there and say that they
8 discriminate.

9 Q And they pretty much all say it's
10 for some legitimate reason, correct?

11 A Of course.

12 Q And Comcast didn't hire you to
13 analyze a decision before they made it, right?

14 A No, I was hired after the fact.

15 Q But Comcast hired you more than a
16 year after they made that decision, correct?

17 A Yes, that is correct.

18 Q And you ultimately analyzed
19 certain documents, right?

20 A Yes, I did.

21 Q And you submitted an expert
22 report?

1 A Yes, I did.

2 Q And that contains your opinion in
3 this case?

4 A Well, I'd say my direct testimony
5 includes my complete opinion.

6 Q Your expert report did as well at
7 that time, didn't it?

8 A At that time, yes.

9 Q And you listed the documents that
10 you relied upon to support your opinion in the
11 expert report, correct?

12 A It relied upon, but not -- I also
13 considered other documents.

14 Q Correct, but you listed the
15 documents that you relied upon in order to
16 form your opinions, correct?

17 A Yes, with one exception. I recall
18 there was one issue in the deposition where
19 there was one left off accidentally.

20 Q And those were internal surveys
21 conducted by Comcast, correct?

22 A I believe that to be the case,

1 yes.

2 Q But you did not list any internal
3 Comcast documents in your export report, did
4 you?

5 A No, because all the documents that
6 I would have cited were most clearly
7 articulated in the answer, so I cited to the
8 answer.

9 Q You did not list any internal
10 Comcast documents as something you relied upon
11 in your expert report, did you?

12 A No, I did not, for the reason I
13 stated.

14 Q And you did not list any
15 interviews that you conducted with Comcast
16 employees, did you?

17 A For the reason I stated in my
18 deposition because everything they told me in
19 the interview they repeated in their
20 declarations.

21 Q Isn't it true, sir, that when I
22 deposed you, you weren't even sure whether you

1 interviewed any other Comcast employees?

2 A If I recall, I said I couldn't
3 recall the precise nature of the conversations
4 because I had been interviewing them also in
5 the NFL context and I wasn't sure which one
6 was which and when, etcetera.

7 Q Correct, you weren't even sure
8 whether you interviewed them in connection
9 with this case, correct?

10 A I couldn't state for 100 percent
11 certainty, but I recall saying my recollection
12 is that I had. But I couldn't say precisely
13 when and where because they said everything
14 that I had heard from them in the context of
15 their testimony. That was my recollection of
16 what I said.

17 Q Do you recall being asked the
18 following question and giving the following
19 answer: "Did you, as you sit here today,
20 recall speaking with Mr. Ortman about that
21 decision?

22 Answer: The answer is I don't

1 recall whether I did or not. I definitely
2 talked to Mr. Bond about various carriage
3 decisions generally, but I'm relying upon Mr.
4 Ortman's statements in his declaration and Mr.
5 Bond's declaration.

6 Question: I just want to break
7 this up to make a nice clean record. The
8 question I have first is, as you sit here
9 today, do you recall speaking with Mr. Ortman
10 about that decision? I think your answer was
11 no.

12 Answer: I don't recall whether I
13 did or not.

14 Question: Let me move on to Mr.
15 Bond. As you sit here today, do you recall
16 speaking with Mr. Bond about that carriage
17 decision?

18 Answer: Same answer. I've talked
19 to Mr. Bond a number of times. I just don't
20 know whether it's in the context of this case
21 or other cases.

22 Question: So the answer is you

1 don't recall?

2 Answer: I do not recall, but I've
3 read their declarations."

4 Do you stand by that testimony?

5 A Yes. I think that's what I just
6 stated, I thought.

7 Q You did not list in your expert
8 report in forming an opinion on
9 nondiscrimination any interviews with any MASN
10 employees, correct?

11 A That is correct, but although I do
12 believe I cited to various documents that MASN
13 put forward in its complaint and attached to
14 its complaint.

15 Q In fact, the only thing that you
16 really listed in your expert report is the
17 complaint, the answer, and the attachments,
18 correct?

19 A Right, well, there were some other
20 documents like the attachments that we've
21 discussed today, etcetera.

22 Q But is it your unequivocal opinion

1 that Comcast did not discriminate against
2 MASN, correct?

3 A Based on the analysis that I've
4 conducted, based on the evidence that I have
5 reviewed, it's consistent with the decisions
6 of other MVPDs, that they have not
7 discriminated based on affiliation.

8 MR. KIM: I'll pass the witness,
9 Your Honor.

10 JUDGE SIPPEL: Any more cross
11 examination from the Bureau?

12 MS. MUMAW: None of the Bureau
13 today.

14 JUDGE SIPPEL: Any redirect?

15 MR. BURKE: No redirect, Your
16 Honor.

17 JUDGE SIPPEL: Okay, you didn't --
18 when you were over on the Economic Council,
19 you didn't get into any of that derivative
20 stuff, did you?

21 (Laughter.)

22 THE WITNESS: No, I did not. In

1 fact, when I was there derivatives were an
2 exceedingly small market.

3 JUDGE SIPPEL: Really?

4 THE WITNESS: Exceedingly small
5 and it was probably one of the mistakes made
6 in the late '90s, early 2000 that they didn't
7 do more to regulate that market.

8 JUDGE SIPPEL: Seems to be the way
9 the evidence is pointing.

10 (Laughter.)

11 THE WITNESS: Yes, absolutely.

12 JUDGE SIPPEL: Okay, thank you
13 very much. I guess -- can we be in recess?
14 What time is it there? 1:30?

15 MR. KIM: One forty, Your Honor,
16 just about.

17 JUDGE SIPPEL: One forty, two
18 forty. Three o'clock? That doesn't make
19 sense, does it? Can we get back at -- wait a
20 minute.

21 MR. KIM: How about 2:45, Your
22 Honor?

1 JUDGE SIPPEL: I was just going to
2 say 2:45. And we have Mr. Gerbrandt and
3 that's it, then. Do you think we'll finish
4 him today?

5 MR. KIM: I certainly hope so. I
6 expect to, Your Honor.

7 JUDGE SIPPEL: Okay.

8 MR. KIRK: Direct will be very
9 short.

10 JUDGE SIPPEL: Thank you. The
11 thing that's got me a little bit hesitant here
12 is nobody has put in the financials and the
13 annual report of Comcast. Does the annual
14 report, does that -- the 10(k) or something --

15 MR. KIM: Your Honor, there is a
16 copy of that document that is attached to the
17 carriage complaint which we've asked the Court
18 to take judicial notice of.

19 JUDGE SIPPEL: Okay, so that's
20 someplace in one of those big binders?

21 MR. KIM: Yes, my belief, Your
22 Honor.

1 JUDGE SIPPEL: Well, my question
2 then is there a description in there about the
3 corporate structure that would show more about
4 how the parent company relates to the
5 affiliates, that the affiliate, internal
6 affiliates, the Comcast affiliates I should
7 say.

8 MR. KIM: Your Honor, there are
9 various documents that we can point to and
10 that we intend to that show the ownership
11 interest and all of the affiliates we're
12 talking about in this case.

13 JUDGE SIPPEL: All right, okay.
14 That's as far as I want to go with that then.
15 But it is in the record.

16 MR. KIM: Yes, sir.

17 JUDGE SIPPEL: At least in the
18 sense of official notice so that I can look at
19 it.

20 MR. KIM: The 10(k) you're
21 referring to, Your Honor, is in the record in
22 terms of official notice. The documents I was

1 referring to about ownership interest --

2 JUDGE SIPPEL: Yes.

3 MR. KIM: Are in evidence in this
4 case.

5 JUDGE SIPPEL: Yes, that's one
6 step further.

7 MR. KIM: Yes, sir.

8 JUDGE SIPPEL: And what is it, for
9 the year 2008 financials, the 10(k) for 2008?

10 MR. KIM: The 10(k) is probably
11 for 2007 or 2006.

12 The 10(k)s lag a certain bit of
13 time and the carriage claim was filed in 2008,
14 correct. We will identify which 10(k)s are
15 attached to the carriage complaint, Your
16 Honor.

17 JUDGE SIPPEL: I think the most
18 current should be in there which we should be
19 -- should be filed as of 2008, I would think.
20 This is what -- we're almost into June. I
21 know there's a lag.

22 MR. KIM: We can do that, Your

1 Honor. We can get that to you.

2 JUDGE SIPPEL: Okay. Let's go.

3 (Whereupon, at 1:40 p.m., the
4 hearing was recessed, to reconvene at 2:45
5 p.m.)

6 JUDGE SIPPEL: I guess we can go
7 on the record.

8 MR. KIRK: We're ready to present
9 Mr. Gerbrandt.

10 JUDGE SIPPEL: Right. Sir, good
11 afternoon.

12 MR. GERBRANDT: Good afternoon,
13 sir.

14 JUDGE SIPPEL: Raise your right
15 hand, please.

16 WHEREUPON,

17 LARRY GERBRANDT
18 was called as a witness and, after having been
19 first duly sworn, was examined and testified
20 as follows:

21 JUDGE SIPPEL: Please be seated.

22 MR. KIRK: Your Honor, may I

1 approach the witness?

2 JUDGE SIPPEL: You surely may, Mr.

3 Kirk.

4 MR. KIRK: I'm handing the witness

5 Comcast Exhibit 3, which has already been

6 entered into evidence.

7 JUDGE SIPPEL: Thank you very

8 much.

9 MR. KIRK: You're welcome.

10 THE WITNESS: Thank you.

11 DIRECT EXAMINATION

12 BY MR. KIRK:

13 Q Mr. Gerbrandt, do you recognize
14 that document?

15 A I do.

16 Q Is it your direct written
17 testimony in this case?

18 A It is.

19 Q Please turn to the last page of
20 your testimony.

21 A Number 13?

22 Q Is that your signature?

1 A It is.

2 Q Is the content of this document
3 true and correct?

4 A They are.

5 Q Where are you currently employed?

6 A I'm a principal at Media
7 Evaluation Partners.

8 Q And what is your role there?

9 A The same as it's been basically
10 throughout my entire career, I'm a media
11 analyst.

12 Q And what does a media analyst do?

13 A We -- at the core, we collect and
14 analyze data related to the media and
15 entertainment sectors.

16 Q And how do you collect that data?

17 A That's changed considerably over
18 the years. In the last few, the internet has
19 certainly helped that process quite a bit. At
20 the same time, there is still a lot of digging
21 into financial reports put out by public and
22 private companies, company presentations. We

1 frequently access both public and private
2 databases, frequently go to industry
3 conferences, interview industry executives,
4 and also conduct consumer surveys or analyze
5 the outcome of other consumer survey
6 information.

7 Q And how do you analyze the data?

8 A Well, the -- again, that's changed
9 -- I've been doing this now for 25 years. We
10 used to do it by hand. More recently,
11 computers have sped that up by allowing you to
12 organize and sort the data. Most of what I do
13 is basically, fairly straightforward math,
14 addition, subtraction, multiplication,
15 division. And at the end, the goal is
16 generally to establish a benchmark, a growth
17 rate, a ratio to understand a revenue per
18 unit, or expenditures, say consumer
19 expenditures per subscriber. Those kinds of
20 ratios are very much the kind of thing that a
21 media analyst does, and generates on a regular
22 basis.

1 Q And does your experience as a
2 media analyst encompass the cable industry?

3 A It does. I've been either part of
4 the cable industry, or an analyst of the cable
5 industry for over 25 years.

6 Q And did you work for a company
7 called Kagan?

8 A I did. It was -- when I joined in
9 1984, it was known as Paul Kagan Associates.
10 I joined as an associate. The company was
11 sold in 2000, and in 2001 I became Chief
12 Operating Officer.

13 Q And what did you do at Kagan?

14 A Well, I was a -- as I said, I've
15 been a media analyst pretty much my entire
16 career, starting with Kagan. My title was
17 actually Senior Analyst and Senior Vice
18 President in charge of the Media and
19 Entertainment Division of Kagan.

20 Q Did you write any reports or
21 newsletters, or any other material for
22 publication while at Kagan?